92-1933

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PATUXENT INSTITUTION BOARD OF REVIEW,
Petitioner,

v.

CLARENCE J. HANCOCK,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Without making any finding that Maryland's parole statute and regulations established a liberty interest in parole, the Court of Appeals of Maryland held that a prisoner's parole had been revoked without constitutionally adequate notice. This case presents the following questions:

1. Is the decision of the Court of Appeals, holding that a parole board's order of parole created a liberty interest that could not be revoked without complying with due process requirements, in conflict with Jago v. Van Curen, 454 U.S. 14 (1981)?

2. If the board's order did create a liberty interest, did the Court of Appeals hold correctly that the parole of an individual who presents a threat to public safety was revoked unconstitutionally because he had not

received written notice that his failure to comply with the instructions and directives of his therapist could result in the loss of his conditional liberty?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding below were the Patuxent Institution Board of Review, petitioner in the court below; and Clarence J. Hancock, respondent below.

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No. 92-____

October Term, 1992

IN THE
SUPREME COURT OF THE UNITED STATES

PATUXENT INSTITUTION BOARD OF REVIEW,

Petitioner,

v.

CLARENCE J. HANCOCK,

Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

The Patuxent Institution Board of Review, an agency of the State of Maryland ("Patuxent" or "State"), respectfully petitions this Court for a writ of certiorari

to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The March 12, 1993 opinion of the Court of Appeals is reported at 329 Md. 556, 620 A.2d 917, and is reprinted at pages 3a-96a of the appendix ("App.") to this petition. The opinion of the Court of Special Appeals of Maryland is unreported and reprinted App. at 97a-112a. The order of the Circuit Court for Howard County is unreported and reprinted App. at 113a-115a. The decision of the Patuxent Institution Board of Review revoking respondent's parole is unreported and reprinted App. at 116a-121a. The order of parole issued to respondent is unreported and reprinted App. at 122a-128a. The memorandum and order of the Circuit Court for Baltimore City is unreported and reprinted App. at

129a-134a.

This Court's April 14, 1993 order denying petitioner's application for a stay of the Court of Appeals' mandate is unreported and reprinted App. at 1a. The Court of Appeals' April 1, 1993 order denying petitioner's motion for reconsideration and the stay of its mandate is unreported and reprinted App. at 2a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on March 12, 1993. This petition was filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1:

> * * * No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Clarence Hancock was sentenced to life imprisonment plus thirty five years following his conviction for murder, attempted murder and assault and battery. (App. at 4a.) For many years prior to his crime, Mr. Hancock experienced sadistic sexual fantasies of rape. After a period of obsessive thoughts about his victim, he decided to break into her house while she was out, tie up her three children and rape her when she returned. Before he could finish with the

children, the victim returned and Mr. Hancock tied and gagged her with the cord and tape he brought with him. Just after Mr. Hancock removed her clothes, the victim screamed. Mr. Hancock grabbed a hammer and beat her to death. When the eleven year old son came to help his mother, Mr. Hancock struck the child 27 or 28 times, inflicting massive and permanent brain damage. (App. at 89-90a.)

Following his incarceration, Mr. Hancock was diagnosed as suffering from sexual sadism and a schizoid personality. He was subsequently admitted to Patuxent Institution, a State agency that operates independently of the State prison system for the purpose of treating and rehabilitating certain criminals with emotional imbalance. See Md. Ann. Code Art. 31B §§ 1, 2 (1957, 1990 Repl. Vol., 1992 Cum. Supp.).

In 1987, the former Director of Patuxent recommended to the Governor that Mr. Hancock be granted parole. (App. at 80a.) The Governor rejected the recommendation. Shortly thereafter, Mr. Hancock's behavior began to deteriorate. (App. at 9a.) A 1989 independent psychological evaluation found him to be dangerous and, in 1990, Patuxent concluded that he no longer qualified as an eligible person under the Patuxent statute and transferred him back to the Division of Correction. (App. at 9a; 81a.)

Mr. Hancock filed a habeas corpus action in July 1990 based on a June 1990 decision of the Court of Appeals of Maryland holding that the gubernatorial approval requirement violated the ex post facto clause. (App. at 9a-10a.) The State court ordered Patuxent to parole Mr. Hancock unless it commenced the legally

mandated procedures to revoke parole. (App. at 11a.) Accordingly, Patuxent served Mr. Hancock with an order of parole, effective only for one year, and at the same time served him with a parole revocation warrant. (App. at 12a-15a; 116a-129a.) Thus, Patuxent exercised its right to revoke Mr. Hancock's parole prior to physically releasing him. (App. at 14a-15a; 22a; 27a.)

Following an administrative hearing at which his therapist testified that Mr. Hancock is dangerous and his parole would pose a threat to public safety because he had not resolved the problems that led to his crime, Patuxent revoked his parole due to his lack of progress in the rehabilitative programs and his ineligibility to continue at Patuxent. (App. at 15a-17a.) The Patuxent Board concluded that since November of 1989, Mr. Hancock "failed to continue seriously addressing the

motivation of his crime, which is critical to his successful rehabilitation." (App. at 16a.) Although he was cautioned on a number of occasions, Mr. Hancock failed to satisfactorily participate in therapy. (Id.) The Board concluded that Mr. Hancock's conduct "thwarted the purpose and mission of the Institution" (App. at 17a), and found that he was in violation of the terms and conditions of parole.

This decision was upheld by the State circuit court but reversed on appeal by the State's intermediate appellate court. (App. at 97a.) The Court of Appeals of Maryland granted the State's petition for writ of certiorari and issued a stay of the judgment pending its decision. On March 12, 1993, the Court of Appeals held, with three judges dissenting, that Mr. Hancock should be released because he had acquired a liberty

interest when Patuxent served him with the order of parole and that his due process rights were violated because he was not made aware that his progress in therapy was an actual condition of parole which would result in loss of liberty if violated. (App. at 3a.)

Patuxent subsequently filed with the Court of Appeals a motion for reconsideration and, in the alternative, for a stay of the issuance of the mandate. After that motion was denied on April 1, 1993 (App. 2a), Patuxent filed an emergency application with this Court for a stay of judgment of the Court of Appeals. Chief Justice Rehnquist, sitting as Circuit Justice, denied that request for a stay on April 14, 1993. (App. at 1a.)

REASONS FOR GRANTING REVIEW

This case presents the important question of whether in the absence of a statute or regulation establishing a

due process right in parole, a liberty interest in parole release can ever be created solely by the acts of State officials. This case also raises the equally significant question of whether a State may revoke parole when it concludes that release will impose an unreasonable risk on society without so stating explicitly in the written order of parole. The Court of Appeals of Maryland held that a State parole board's order of parole conferred upon a prisoner a constitutionally-protected liberty interest that could not be revoked without complying with due process. The Court of Appeals also held that due process was violated because the conduct underlying the revocation of respondent's parole was not criminal and respondent was not notified adequately in advance that his parole could be revoked. This case warrants review because Maryland's highest court has

decided these federal questions in a way that conflicts with applicable decisions of this Court, including Jago v. Van Curen, 454 U.S. 14 (1981), and the decisions of other courts, and impairs substantially the flexibility that prison officials and parole authorities must have in deciding whether to release convicted felons into the community.

This Court has held that there is no inherent constitutional entitlement to be released prior to serving a sentence of imprisonment and that a due process right to parole can be created only by a State's statutes and regulations. Indeed, in determining whether an inmate has a liberty interest entitled to due process protection, this Court has emphasized repeatedly that the language of the applicable prison statutes and regulations must be closely examined. Without exception, therefore, this

Court has based its analysis on State law in resolving whether there exists a protected interest in parole, good-time credits, transfer, or form of confinement.

In contrast with this Court's decisions, the Court of Appeals held that a liberty interest in parole can be created solely by a parole board's order authorizing respondent's release, notwithstanding that the parole board acted simultaneously to revoke that parole. No such right can be found to exist without conducting the required inquiry into the applicable parole statutes and regulations. Nor can a court properly hold that such a right exists in States such as Maryland that have endowed their officials with the unfettered discretion to revoke an inmate's eligibility for parole at any time. This Court should accordingly review this case and reverse the sweeping and unsound rule of federal

constitutional law announced by the Court of Appeals.

Assuming that the parole board's order created a constitutionally protected liberty interest in parole, review is also warranted to address the currently unresolved but important issue of what notice a State must first provide a parolee before that person's parole may be revoked. The Court of Appeals held that because the conduct that formed the basis for the parole revocation in this case was not in violation of any law and did not constitute an institutional infraction, due process required that the respondent, who was incarcerated in and paroled from a correctional institution uniquely conceived to treat individuals with serious emotional deficiencies, be specifically notified in advance that his failure to satisfactorily participate in therapy and resolve the deficiencies that motivated his

criminal conduct would result in the revocation of his parole. This Court should address whether the States are prohibited from terminating a parolee's conditional liberty unless they first explicitly apprise that person of each circumstance that could lead to his or her reincarceration.

I. THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER A STATE PAROLE BOARD'S ACTIONS CAN EVER CREATE A LIBERTY INTEREST IN PAROLE RELEASE.

A. The Decision Below Is In Conflict With Applicable Decisions Of This Court.

Observing that a constitutionally-protected liberty interest in parole release may be created by "a statute, administrative rules or regulations, or accepted practices," (App. at 53a) (emphasis added), the Court of Appeals held that when petitioner Patuxent Institution

Board of Review "served the respondent with an Order of Parole and a copy of a parole agreement, the petitioner effected the respondent's parole and, in the process, created in him a liberty interest in parole release." (App. at 57a-58a.) This case squarely raises the important question, therefore, about whether a prisoner's due process right to parole can be caused solely by the acts of State officials and thus whether, as the Court of Appeals held, "the Order of Parole created a liberty interest." (App. at 62a.) While this Court has never addressed this constitutional question in this specific context, the rationale of its prior decisions mandates reversal of the court below.

"Liberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause itself and the laws of the States." Hewitt

v. Helms, 459 U.S. 460, 466 (1983). With respect to parole, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7 (1979). Rather, this Court has looked exclusively to the States' statutes and regulations when determining the existence of liberty interests in the context of parole and other prison settings. See, e.g., Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454 (1989) (visitation privileges); Board of Pardons v. Allen, 482 U.S. 369 (1987) (parole); Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer); Hewitt v. Helms, 459 U.S. 460 (form of confinement); Jago v. Van Curen, 454 U.S. 14 (1981) (parole); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981)

(sentence commutation); Greenholtz, 442 U.S. 1 (parole); Wolff v. McDonnell, 418 U.S. 539 (1974) (good-time credits).

Further, as this Court has explained, in determining "that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, . . . our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations." Kentucky Dept. of Corrections, 490 U.S. at 461 (emphasis added) (footnote omitted). Conversely, this Court has never held that a prisoner has a liberty interest without finding that a State law created such an interest "by establishing 'substantive predicates' to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have

been met." Id. at 462 (citation omitted).

The language of the relevant Maryland law imposes no substantive restraints that create a liberty interest in parole. Md. Ann. Code Art. 31B, § 11(b)(1) provides that the State "[a]t any time" "may" conclude a person is no longer eligible to participate in Patuxent and thus be paroled from that institution, and that the State may instead transfer that person to "an appropriate correctional facility designated by the Commissioner." Moreover, that same statute provides that the State "may" act upon an inmate's request for parole, but only if it chooses to do so. Id. This statutory scheme suggests strongly that respondent has no due process right because "statutes or regulations that provide that a parole board 'may' release an inmate on parole do not give rise to a protected liberty interest." Board of

Pardons v. Allen, 482 U.S. at 378 n.10 (citing cases).

Because the Court of Appeals did not even address Maryland's regulatory scheme governing parole, however, nor make any finding that the State's parole statute and regulations created a due process interest, the court "abandoned the essential inquiry in determining whether" Maryland's "statute creates a liberty interest." Board of Pardons v. Allen, 482 U.S. at 385 (O'Connor, J., dissenting). In holding in the absence of such a fundamental examination that the State parole board's actions created a liberty interest in parole, the Maryland court has fashioned an unprecedented rule of constitutional law that "severely restrict[s] the necessary flexibility of prison administrators and parole authorities. . . ." Jago v. Van Curen, 454 U.S. at 19. Under that rule, "any one of their myriad decisions with

respect to individual inmates may, as under the general law of contracts, give rise to protected 'liberty' interests which could not thereafter be impaired without a constitutionally mandated hearing under the Due Process Clause." Id.

This Court's per curiam opinion in Jago v. Van Curen rejected a virtually identical lower court holding in finding that no due process violation was caused by a parole board's unilateral rescission of its decision to grant parole when Ohio law created no protected liberty interest in parole release. See 454 U.S. at 20-21. The court below distinguished Jago on the ground that "[t]he respondent in Jago had not been paroled, but merely recommended for parole," while "[t]he critical decision in the case before us was not favorably to recommend parole; rather, it was to grant it. Such a decision may

not, without complying with due process, be rescinded based on new information discovered before physical release has actually occurred." (App. at 61a.) As in Jago, however, because there is no finding that the State's parole law and regulations created a liberty interest, the actions of State officials taken in response to an inmate's request for parolee furnish the only basis "from which the liberty interest flowed." (App. at 58a.) That seems to be precisely what this Court held cannot support a constitutional right to parole.

Even if, as the Court of Appeals found, the State's conduct led respondent to believe that he had all of the rights of a parolee (see App. at 61a-62a), that would not appear to create a constitutionally-protected liberty interest. Those State actions do not establish a constitutional right because "a mere expectation of a

benefit -- even if that expectation is supported by consistent government practice -- is not sufficient to create an interest protected by procedural due process." Board of Pardons v. Allen, 482 U.S. at 382 (O'Connor, J., dissenting). "A constitutional entitlement cannot 'be created -- as if by estoppel -- merely because a wholly and expressly discretionary state privilege has been granted generously in the past.'" Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465 (emphasis and citation omitted).

Moreover, because Maryland law limits the initial grant of parole to a period "not exceeding one year," Md. Ann. Code Art. 31B, § 11(b)(2), and because that year expired in August, 1991, when this case was on appeal, Mr. Hancock could no longer claim even an expectation of release. The State's actions in this case

"standing alone generate no constitutional protections; a contrary conclusion would trivialize the Constitution." Connecticut Board of Pardons v. Dumschat, 452 U.S. at 465.

Because "the Maryland parole statute does not create a legitimate expectation of parole release," Bryant v. State, 848 F.2d 492, 493 (4th Cir. 1988), and because the Court of Appeals did not even conduct such an inquiry as this Court "always" has when examining whether a State has "granted inmates a protected interest in parole," Kentucky Dept. of Corrections v. Thompson, 490 U.S. at 461, the court erroneously held that the State's actions in this case generated a liberty interest. Therefore, the holding below that the parole board's order of parole established a liberty interest is in conflict with applicable decisions of this Court. This

Court should grant review and reverse that decision. See Sup. Ct. R. 10.1(c).

B. The Decision Below Is In Conflict With Decisions Of Other Courts.

A further reason for granting review is that the Court of Appeals has decided a federal question in a way that conflicts with the decisions of several United States courts of appeals and of another state court of last resort. The court's holding that respondent had a liberty interest in parole is in conflict with the decision in Bryant v. State, 848 F.2d 492 (4th Cir. 1988), where the Fourth Circuit held that Maryland's parole statute created "no right protected by the due process clause." Id. at 493. The decision below also is in conflict with the decisions of other courts that have held that in the absence of a liberty interest created by a State's laws or

regulations, the actions of State officials by themselves are insufficient to create a liberty interest in parole. See Ingrassia v. Purkett, 985 F.2d 987, 988 (8th Cir. 1993); Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235-238 (6th Cir. 1991); Winters v. Solem, 444 N.W.2d 722 (S.D. 1989). See also Johnson v. Pennsylvania Board of Probation and Parole, 532 A.2d 50, 52 (Pa.Cmwlth. 1987). This Court should resolve these conflicts. See Sup. Ct. R. 10.1(b).

II. THIS CASE PRESENTS THE SIGNIFICANT ISSUE OF FIRST IMPRESSION OF WHAT NOTICE IS CONSTITUTIONALLY DUE WHEN REVOKING A PRISONER'S PAROLE.

This case also presents a fundamental issue "which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(b). That issue is, assuming the Due

Process Clause is applicable in this case, what type of notice State officials are required to provide before they may revoke an individual's parole. The Court of Appeals held that despite respondent's incarceration in and parole from a prison facility designed specially to treat individuals with serious emotional disorders, the State revoked unconstitutionally his parole on the ground that he failed to participate satisfactorily in therapy because it did not notify him in advance that "therapy was an actual condition of parole which, if violated, would result in loss of liberty." (App. at 70a.) That narrow interpretation of the Fourteenth Amendment cannot be the constitutional law of the United States.

While this Court has noted that typical parole conditions, such as that the parolee avoid "undesirable" associations, may be "quite vague," see Morrissey v.

Brewer, 408 U.S. 471, 479 (1972), it has never defined the notice that the States are required to provide parolees under the Due Process Clause before terminating their conditional liberty. The absence of guidance in this area has contributed to an assortment of inconsistent lower court decisions. See Cohen, Neil P., Gobert, James J., The Law of Probation and Parole, § 5.05, at 197 (1983; 1992 Cum. Supp.) ("Many judicial opinions establishing standards of precision for probation and parole conditions assume that due process governs the clarity with which the conditions must be expressed, but do not agree on, and often do not even discuss, the appropriate test to be used in assessing the validity of a given condition.") (footnotes omitted).

This inconsistency is particularly evident in cases addressing the constitutional validity of decisions

revoking parole or probation due to the failure to participate in therapy, with some courts, such as the court below, holding that a parolee's liberty cannot be revoked unless that individual is explicitly notified of the requirement to fully attend and participate in therapy, see also Benboe v. State, 738 P.2d 356 (Alaska App. 1987), and other courts reaching a contrary conclusion. See, e.g., State v. Vermont, 578 A.2d 104, 106 (Vt. 1990) (rejecting probationer's contention that "because his probation agreement neither explicitly nor implicitly required that he admit having had sexual intercourse with his stepdaughter, he had no fair notice that his probation could be revoked based on his refusal to make such an admission.").

The facts surrounding respondent's incarceration and parole in this case demonstrate that he was on fair notice

that his failure to fully participate in therapy could lead to the revocation of his parole. The central purpose of the penal institution where he was imprisoned and paroled from is to provide efficient and adequate programs and services for the treatment of individuals suffering from serious deficient intellectual and emotional imbalances.[1] Respondent's attendance in therapy and other weekly supervision sessions is inextricably intertwined with that mission because therapy plays an instrumental role in the institution's exercise of its statutory responsibility both to provide treatment to individuals with dangerous behavioral disorders and, concomitantly, to evaluate whether an

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[1] See Md. Ann. Code Art. 31B, § 2; Director v. Daniels, 243 Md. 16, 31, 221 A.2d 397, 410-11, cert. denied sub nom., Avey v. Boslow, 385 U.S. 940 (1966); App. at 4a-5a.

individual presents an unreasonable risk to the community and thus is statutorily eligible to receive and/or remain on parole. See Md. Ann. Code Art. 31B, §§ 11(b)(2); 11(c).

Respondent was necessarily on notice, therefore, of his obligation to fully participate in therapy. To have any expectation of early parole, Mr. Hancock was on notice that he must remain an "eligible person," which under the Patuxent statute is defined as "one likely to respond favorably to the programs and services provided at Patuxent." Md. Ann. Code Art. 31B, § 1(g). As the dissent below stated, "implicit in the grant of parole from Patuxent Institution would be the conditions that the inmate remain legally eligible for parole status, and that parole of the inmate 'will not impose an unreasonable risk on society. . . .' Maryland Code

(1957, 1990 Repl. Vol.) Art. 31B, § 11(b)(2). These are conditions 'so basic and fundamental that any reasonable person would be aware of such condition[s].'" (App. at 88a) (citation omitted).

The Court of Appeals nevertheless stated that "[b]ecause the conduct on the basis of which the revocation was premised was not criminal . . . and did not constitute an institutional infraction, . . . we hold that respondent's parole was improperly revoked, he not having been notified, in advance, of the condition allegedly violated." (App. at 68a-69a.) This Court should review this case to decide if the Court of Appeals was correct when it held that the Constitution is so rigid that in order to revoke the parole of an individual who currently presents a risk to society, prison officials must have anticipated and imposed specific parole conditions

for all conduct that manifests this dangerousness.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, that judgment should by reversed.

Respectfully submitted,

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